(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: OCT 0 8 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. According to Part 6 of the Form I-140, the petitioner seeks employment as a "Special Education Teacher" for . The petitioner has worked for since 2007. At the time of filing, the petitioner was teaching at in Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The record reflects that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest is not sufficient to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner has established that her work as a special education teacher is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of petitioner's work would be national in scope and whether she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. Assertions regarding the overall importance of an alien's area of expertise cannot suffice to

establish eligibility for a national interest waiver. *Id.* at 220. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

The petitioner filed the Form I-140 petition on June 29, 2012. In a June 28, 2012 letter accompanying the petition, counsel stated that the petitioner's national interest waiver is "based on her expertise as evidenced by her advanced degrees, her extensive experience and numerous achievements and citations." Academic degrees, experience, and recognition for achievements are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. With regard to the petitioner's advanced degrees, the director has already determined that the petitioner qualifies for classification as a member of the professions holding an advanced degree. This issue in this matter is whether the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement. The petitioner's recognized achievements and work experience as a special educator will be further discussed later in this decision.

The petitioner submitted various letters of support from administrators and teachers discussing her work as an educator. As some of the letters contain similar claims addressed in other letters, not every letter will be quoted. Instead, only selected examples will be discussed to illustrate the nature of the references' claims.

Principal, stated:

> This letter serves as a recommendation for [the petitioner], a full time Special Education Teacher at She has taught Regional Class-Ortho, and now Regional Class-Autism Group in our Special Education Department. I have known her for more than three years now and it is her 4th year at
>
> [The petitioner] has the heart of benevolence to the education of special children. She is talented, well-planned and does excellent job in executing lessons in her class. Her special training and duties include writing IEP [Individualized Education Program], making ALT-MSA [Alternative Maryland State Assessment] artifacts, holding a meeting with the team and parents, managing students' classroom behavior, and other things that pertain to the well-being of our students. She does outstanding job in incorporating different modalities of teaching and learning. On a professional note, [the petitioner] follows protocol, respects authorities, works well with her teammates and other staff members. She has a great rapport with the students and their parents.

Mr. comments on the petitioner's effectiveness as a special educator and her responsibilities at but he does not indicate that the petitioner's work has had, or will

continue to have, an impact beyond the students under her tutelage and the local school system that employed her.

[redacted] Assistant Principal, [redacted] stated:

> As assistant principal, I observed how [the petitioner] conducts her classes in the Special Education Department, CRI (Community Reference Instruction) Program. CRI is a self-contained class, except for Music and Adapted P.E. (Physical Education). [The petitioner] teaches Reading, Mathematics, Science and Social Studies. I have observed [the petitioner] switched from Direct to One-on-One instruction using technologies available for Verbal and Non-Verbal Students. This year, she was assigned to teach 8 students, 2 are non-verbal and 6 are verbal students who have different disabilities ranging from Intellectual Disability to Autism with Asperger's Syndrome. [The petitioner] was very comfortable using all technologies and programs appropriate to students' learning needs. [The petitioner's] Computer/Pixwriter, Reading, Writing, Individual/Social Task, IEP stations in every lesson accomplished and done by the students in a timely manner. She is compassionate, but firm, in her dealing with her students.
>
> [The petitioner] maintains parental logs in the students' IEP, daily logs in student's communication book, telephone logs, and attends her student's IEP meetings.
>
> [The petitioner] is very conscientious, committed and a model teacher, she strives for her students to pass and improve performance in ALT-MSA (Alternative Maryland State Assessment).

Mr. [redacted] comments on the petitioner's teaching duties and the quality of her instruction at [redacted] but his observations do not set the petitioner apart from other competent and qualified teachers, or explain how the petitioner's work has impacted the field beyond the students at her school.

[redacted] Special Education Teacher, [redacted] stated:

> I had the privilege to work with [the petitioner] at [redacted] since 1996 to 2007 for a period of ten (10) years before coming to United States of America. We worked together as a faculty member and colleague of the above-mentioned University. The following is my honest observation of her:
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> - As lecturer on a topic "Oral Speech for Special Education Teachers," I found her very inspiring and knowledgeable about Picture Communication Symbols (PECS) and Voice Output Device, (VOID). These tools are very vital in communicating with non-verbal children. She is my model for communicating with Special Education Children;
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> - As a volunteer teacher in the Special Education Department under the umbrella of the College of Education, [the petitioner] is tireless. She squeezed time to have a hands on

with students of diverse disabilities-autistic, hyper activity, mental retardation and with behavior problems. She can reach out even to the parents who are on the stage of "denial" meaning they refused to understand that their children have learning disabilities;

- As a founder of RAP, (Reading Association of the Philippines,) [redacted] her encouragement for teachers and students alike to make it a habit to read is contagious;

- As a leader, she indirectly models for us to follow and keep up the good work; and

- As a colleague, she is selfless, she thinks of others before herself, giving extra miles to support and share be it academic or personal.

It is my great pleasure to speak about [the petitioner], and may this recommendation drive home the point that she is an exemplary teacher, a good fellow worker and a colleague needed in a workplace or any institute of learning.

Ms. [redacted] comments on the petitioner's work as a faculty member at [redacted] but Ms. [redacted] fails to provide specific examples of how the petitioner's work has influenced the field as a whole. At issue is whether this petitioner's contributions in the field are of such significance that she merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification she seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. Regardless, the record does not indicate that the petitioner continues to perform similar activities in a university setting in the United States. The petitioner's past duties on a university's faculty are not necessarily a reliable guide for what the petitioner will do as a [redacted] special education teacher.

The petitioner's references praise the petitioner's teaching abilities and personal character, but they do not demonstrate that the petitioner's work has had an impact or influence outside of the schools where she has taught. They also do not address the *NYSDOT* guidelines which, as published precedent, are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). That decision cited school teachers as an example of a profession in a field with overall national importance (education), but in which individual workers generally do not produce benefits that are national in scope. *NYSDOT* at 217, n.3. In the present matter, the benefits of the petitioner's impact as special educator are limited to the students at her school and, therefore, not national in scope.

In addition to reference letters, the petitioner submitted the following:

1. A Certificate of Award from the principal of [redacted] in appreciation of the petitioner's "professional commitment, dedication, and performance at [redacted]' (June 11, 2012);
2. A Certificate of Appreciation from the [redacted] for her "efforts and dedication in serving the

Agency as an Accreditor and partner in promoting quality Christian Education through Voluntary Accreditation" (May 26, 2005);

3. A Certificate of Appreciation from for delivering a lecture on "Strategies in Teaching English" (June 9, 2004);
4. A Certificate of Appreciation from for serving as a resource speaker on the topic "Making Effective Presentations for Teachers" (November 8, 2002);
5. A Certificate of Appreciation from for serving as a resource speaker on the topic "Responding to Literature Through Writing" (November 8, 2002);
6. A Certificate of Appreciation from for serving "as Facilitator during the Seminar-Workshop on Values Infusion and Immersion and launching the Trait of the Week Program" (November 22, 2002);
7. A "Teacher Leadership Project Final Award" as "Instructional Team Leader" from the principal of (May 11, 2012);
8. A Certificate of Appreciation from for services as Chairman of the Language Department (July 13, 2001);
9. A Certificate of Recognition from the for promoting National Crime Prevention Week concepts at the (September 7, 2000);
10. A Certificate of Appreciation from "for having served as guest speaker in the Seminar-Workshop on Teaching Methodologies" (May 9, 1999);
11. A Certificate of Appreciation from for serving as a guest speaker at a seminar entitled "Business Communication" (December 10, 1998);
12. A Certificate of Appreciation from for lecturing on the topic "Speech Power and Personality Development" (December 10, 1998);
13. A Certificate of Appreciation from for serving as a speaker at "the Seminar Workshop" (March 12, 2004);
14. A Certificate of Appreciation from for speaking on the topic "Concerns in Language Teaching in the New Millennium" (June 2001);
15. A Certificate of Appreciation from for "sharing his/her knowledge and expertise as Guest in 'Educating the Filipino,' the official radio program of ' (November 30, 2002);
16. A Maryland Educator Certificate;
17. A Professional Teacher certification from the Republic of the Philippines Professional Regulation Commission, Manila;
18. Praxis Series test results
19. Degrees and academic transcripts; and
20. Employment verifications.

Again, academic records, experience, professional certifications, and recognition for achievements are all elements are all elements that pertain to a finding of exceptional ability, but exceptional ability is not sufficient to warrant the national interest waiver. The plain language of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are subject to the job offer requirement (including alien employment certification). Particularly significant awards may serve as evidence of the petitioner's impact and influence on her field, but the petitioner has failed to

demonstrate that the awards she received (items 1 – 15) have more than local or institutional significance. For instance, the petitioner's awards from the principal of (items 1 and 7) and certificates of appreciation from (items 3 – 6, 8, and 11 – 15) reflect institutional recognition for school faculty rather than nationally significant awards in the field of education. There is no documentary evidence showing that items 1 – 20 are indicative of the petitioner's influence on the field of education at the national level.

The petitioner submitted certificates of proficiency, participation, completion, and attendance for training courses, seminars, and workshops relating to her professional development. While taking courses and attending seminars and workshops are ways to increase one's professional knowledge and to improve as a teacher, there is nothing inherent in these activities to establish eligibility for the national interest waiver.

The petitioner submitted copies of her "satisfactory" teacher evaluations from The petitioner, however, did not submit documentary evidence indicating that she has impacted the field to a substantially greater degree than other similary qualified special education teachers. Moreover, there is no evidence showing that the petitioner's specific work has had significant impact outside of the schools where she has taught.

The petitioner submitted several articles that briefly mention her involvement in events and organizations, but circulation evidence for the newspapers, newsletters, and school publication in which the articles appeared was not submitted to demonstrate the scope of the readership which would support a finding that the petitioner's work has had national impact. In addition, none of the articles contains information demonstrating that the petitioner has influenced the field of special education as a whole.

The director issued a request for evidence, instructing the petitioner to submit evidence to establish that the benefits of her proposed employment "will impart national-level benefits" and that her "past record of achievement . . . justifies projections of future benefit to the national interest."

In response, the petitioner submitted President George H.W. Bush's "Remarks on Signing the Immigration Act of 1990"; information about Public Law 94-142; a copy the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); a copy of Section 1119 of the No Child Left Behind Act (NCLBA); a statement by U.S. Secretary of Education Arne Duncan on the National Assessment of Educational Progress Reading and Math 2011 Results; a September 26, 2011 article in *Education Week* entitled "Shortage of Special Education Teachers Includes Their Teachers"; information about STEM (science, technology, engineering and mathematics) fields printed from the online encyclopedia *Wikipedia*; an article entitled "STEM Sell: Are Math and Science Really More Important Than Other Subjects?"; a report entitled "Special Education Teacher Retention and Attrition: A Critical Analysis of the Literature"; an abstract for a report entitled "SPeNSE: Study of Personnel Needs In Special Education"; a 2009 article in the *Wall Street Journal* entitled "The Importance Math & Science in Education"; an article entitled "Importance of Science and Math Education"; and the written testimony of Microsoft's Bill Gates before the Committee on Science and Technology of the United States House of Representatives (March 12, 2008). As

previously discussed, general arguments or information regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field. *NYSDOT*, 22 I&N Dec. at 217. These assertions address only the "substantial intrinsic merit" prong of *NYSDOT*'s national interest test. None of the preceding documents demonstrates that the petitioner's specific work has influenced the field as a whole.

The petitioner submitted excerpts from a book that she authored entitled and a November 20, 2012 certification from " stating that the book has sold 585 copies since its publication in 2004. There is no documentary evidence showing that this book or any other publications authored by the petitioner have been frequently cited by independent educational scholars, have had a national impact on teaching methodologies, or have otherwise influenced the field of education as a whole.

The petitioner submitted documentation indicating that she received "Highly Satisfactory" ratings from from 1996 – 2006. Once again, there is no documentary evidence indicating that the petitioner has impacted the field to a substantially greater degree than other similary qualified special education teachers. In addition, there is no evidence showing that the petitioner's specific work has had significant impact outside of the schools where she has taught.

The petitioner submitted an October 27, 2012 Certificate of Excellence from the "for sharing her expertise in 'Strategies in Reading Framework for Teaching Lesson Planning,'" The certificate, however, was received by the petitioner subsequent to the filing date of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the certificate cannot be considered as evidence to establish the petitioner's eligibility.

The petitioner submitted documentation indicating that she has provided service and support for various charitable causes and Christian ministries, but there is no documentary evidence demonstrating that petitioner's work has influenced the field of education as a whole.

The petitioner submitted a letter from parents of a student taught by the petitioner at stating:

> [The petitioner] has been a teacher of during 7th and 8th Grades. . . . He is diagnosed to have ASD (Autism Spectrum Disorder) and cannot talk. [The petitioner] has gone out of her way to help him through the use of Technology such as Pixwriter software, Talk Tech, Big and Small Macks and other Voice Output Devices.

> [The petitioner] ran a very organized classroom. She is very articulate and expressive in both spoken and written languages. She is a very active teacher and interacted with her students in a friendly manner. She demonstrated genuine caring and respect for individual students and went extra miles to help them. [The petitioner] teaches reading and never gets tired of encouraging students to learn according to their diverse needs. She has strong rapport with parents and other teachers, and adults in her classroom.
>
> [redacted] had made some significant progress with his behavior and speech under [the petitioner]. [The petitioner] knows him very well. . . . We need more teachers like her who exerts selfless efforts to our children.

Mr. and Mrs. [redacted] speak highly of the petitioner's teaching capabilities and her interactions with their son and his classmates. While their comments demonstrate that the petitioner works in an area of substantial intrinsic merit, they do not indicate that the petitioner's work has influenced the field as whole, or that the petitioner has or will benefit the United States to a greater extent than other qualified special education teachers.

The petitioner also submitted a letter from [redacted] Paraprofessional Educator, [redacted] stating:

> [The petitioner] immediately established rapport with her 8th grade special needs students whose disabilities ranged from autism to Downs Syndrome. She quickly proceeded to learn each child's strengths and weaknesses. This prepared her to address various academic needs with carefully planned classwork and homework.

Ms. [redacted] comments on the petitioner's effectiveness as a special educator, but does not provide specific examples of how the petitioner's work has influenced the field as a whole.

The petitioner's references speak admirably about her, but their comments do not establish that the benefits of the petitioner's employment with [redacted] are national in scope or that her past record of achievement is at a level that would demonstrate her eligibility for a national interest waiver. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of the petitioner's references are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to

whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

The director denied the petition on February 1, 2013. The director found that the petitioner failed to establish that an exemption from the requirement of a job offer would be in the national interest of the United States. The director indicated that the benefits of the petitioner's work as a special education teacher for are "limited to a local impact." The director also determined that the petitioner had failed to demonstrate "original innovations in teaching special education that would benefit the national interest."

On appeal, counsel asserts that "USCIS erred in giving insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001 as the guiding principle rather than the precedent case" *NYSDOT*. Counsel, however, does not identify any specific legislative or regulatory provisions in the NCLBA that exempt foreign school teachers from *NYSDOT* or reduce its impact on them. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not exist. With regard to following the guidelines set forth in *NYSDOT*, by law, USCIS does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c).

Counsel points to the NCLBA and other government initiatives to reform and improve public education. Counsel states that Congress passed the NCLBA three years after the issuance of *NYSDOT* as a precedent decision and that "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel does not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel further states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlights the phrase "national . . . educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." By the plain language of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for foreign teachers.

Counsel quotes remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel asserts that the benefit arising from the petitioner's work is national in scope because of the "national priority goal of closing the achievement gap." The record, however, contains no evidence that the petitioner's efforts have significantly closed that gap. The national importance of "education" as a concept, or "educators" as a class, does not establish that the work of one teacher produces benefits that are national in scope. *See NYSDOT* at 217, n.3. A local-scale contribution to an overall national effort does not meet the *NYSDOT* threshold. The aggregate national effect from thousands of teachers does not give national scope to the work of each individual teacher.

Counsel continues:

> The national priority goal of closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children is especially relevant in the context of The 2012 MSA [Maryland School Assessment] Reading results show that out of the 24 Maryland school districts ranked near the bottom at the 'All Student' level for each MSA-covered grade level . . . .
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> * * *
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> Additionally, it is noteworthy that the updated 2012 Maryland Report Card shows that did not meet its Reading proficiency AMO targets . . . .

The petitioner's evidence includes MSA Reading results for and public schools, and public school progress reports for and The petitioner has worked for since 2007, and thus had been there for a number of

years before the administration of the 2012 MSA tests. Counsel fails to explain how the 2012 MSA results for (which indicate low rankings relative to other Maryland school districts) establish that the petitioner has played an effective role in "closing the achievement gap."

Counsel states that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but he cited no documentary evidence to support that claim. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In addition, while counsel asserts that the petitioner has "proven success in raising proficiency of her students," he did not point to specific STEM test results or other documentary evidence in the record to support the assertion. Regardless, there is no documentation demonstrating that the petitioner has had an impact or influence outside of

Counsel points to the petitioner's award certificates, publications, and educational credentials as evidence of her "past history of achievement." As previously discussed, the preceding evidence does not show that the petitioner has had a wider impact on the field of special education or otherwise influenced the field as a whole.

Counsel states that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers and that USCIS "should have presented its own comparable worker." The *NYSDOT* guidelines, however, do not require an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision is that the petitioner must establish a record of influence on the field as a whole. Moreover, there is no provision in the statute, regulations, or *NYSDOT* requiring the director to specifically identify another equally qualified special educator. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

Counsel claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As previously discussed, the requirements for exceptional ability are separate from the threshold for the national interest waiver. It remains that the petitioner's evidence does not facially establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school district where she has worked.

Counsel cites to studies pointing to high turnover rates and inexperience among special education teachers. As the alien employment certification process was designed to address the issue of worker shortages, a shortage of qualified workers in a given field does not establish eligibility for the national interest waiver. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT* at 221. This information submitted by

the petitioner shows that there is a demand for credentialed special education teachers, a demand that the labor certification process can address.

Counsel asserts that the labor certification process poses a "dilemma" for the petitioner because she possesses qualifications above the minimum required for the job she seeks. Counsel states that the labor certification guidelines "require only a bachelor's degree," and therefore "may not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." On page 15 of the appellate brief, however, counsel acknowledges that the statutory definition of a "Highly Qualified Teacher" requires only a bachelor's degree and state certification.

Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

In addition, the petitioner submitted information from the U.S. Department of Labor's *Occupational Outlook Handbook* describing the minimum qualifications necessary to become a special education teacher:

> Public school teachers are required to have a least a bachelor's degree and a state-issued certification or license.
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> * * *
>
> Education
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> All states require public special education teachers to have at least a bachelor's degree. Some of these teachers major in elementary education or a content area, such as math or chemistry, and minor in special education. Others get a degree specifically in special education.
>
> * * *
>
> Some states require special education teachers to earn a master's degree in special education after earning their teaching certification.
>
> * * *

Licenses

All states require teachers in public schools to be licensed. A license is frequently referred to as a certification.

* * *

Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, which is typically gained through student teaching. Some states require a minimum grade point average.

Many states offer general special education licenses that allow teachers to work with students across a variety of disability categories. Others license different specialties within special education.

Teachers are often required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.

Some states allow special education teachers to transfer their licenses from another state. However, some states require even an experienced teacher to pass their own licensing requirements.

All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification. Some alternative certification programs allow candidates to begin teaching immediately, under the close supervision of an experienced teacher.

The petitioner has not established that the "Highly Qualified" standard involves requirements that are significantly more stringent than those outlined in the *Occupational Outlook Handbook*, or that a public school could not obtain a labor certification for a "Highly Qualified Teacher." Thus, the petitioner's level of education and experience are not required for "highly qualified" status under the NCLBA. Counsel, therefore, did not support the claim that the labor certification process frustrates the NCLBA's mandate for schools to employ "highly qualified teachers."

Counsel contends that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel, however, offers no specific examples of school closures and teacher layoffs attributable to not meeting NCLBA standards. Once again, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In addition, counsel asserts that by waiving the labor certification requirement for highly qualified special educators such

as the petitioner, "more American teachers will have . . . employment opportunities" because standards will be met and schools will not be abolished. However, neither the Immigration and Nationality Act nor the NCLBA, create or imply any blanket waiver for highly qualified foreign teachers. USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *NYSDOT* at 217.

A plain reading of the statute indicates that engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. The petitioner has not established that her past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *See NYSDOT*, 22 I&N Dec. 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole."). On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende* at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.